1351 No. 4035. 1351

1351

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

ALBERT STEFFEN,

Plaintiff in Error,

vs.

UNITED STATES OF AMERICA,

Defendant in Error.

Brief for Plaintiff in Error

CHARLES W. GARLAND,
Attorney for Plaintiff in Error.

No. 4035.

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STATEMENT OF THE CASE.

The plaintiff in error, who will hereinafter be referred to as the defendant, was accused of a violation of Section 192 of the Penal Code by an indictment filed in the District Court of the State of Oregon. The indictment contains one count and alleges that on the 19th day of July, 1922, the defendant with two others

> "did knowingly, wilfully, unlawfully and feloniously attempt to forcibly break into a certain building to-wit; a building known and described as number 1094 Hawthorne Avenue, Portland, Oregon, which said building was then and there used in part as a post-office, to-wit; as Sub-Station number 22, of the Portland, Oregon, post-office, with the intent on the part of them, the said defendants, to commit larceny,

in the part of said building so used as a post-office as aforesaid."

Defendants pleaded not guilty, and the cause was tried upon the 3d day of November, 1922. Evidence was introduced at the trial to show that upon the day alleged, the defendant was seen by a policeman at about 12:30 in the morning standing inside the door of a hallway back of the drug store in which the post-office was located, and at the foot of stairs leading to a rooming house above. The defendant was alone, doing nothing, and was not armed. Leaving the defendant and walking further into the hallway, the officer discovered the other defendants standing behind a door. One had a wire in his hand, and one had a tobacco can full of soap. The next morning two vials of nitro glycerine were found in the gutter in front of the hallway. As soon as the officer left him the defendant proceeded to his home.

The officer testified that the defendant when searched had nothing to say, and was doing nothing wrong. The hallway was open to the public. The officer identified the defendant two days later as the person he had seen in the doorway.

At the close of the government's case, a motion was made for a directed verdict in favor of the defendant, which was denied.

The defendants Bosler and Klinesmith, who were the men caught behind the door, testified that they had met the defendant Steffen on one of the principal street corners of Portland, and saw that he was intoxicated. They took him to their room on the east side of the river. That Steffen was so intoxicated that they had to support him by each arm to get him there, and upon his arrival he was laid

upon the bed and went to sleep. A few hours later they decided to rob the post-office and took the defendant along. That he did not hear the conversation in the room and did not know the purpose of the trip. The defendant went upon the stand and testified in corroboration of his co-defendants.

At the close of the defense, no motion was made by defendant for an instructed verdict.

The jury rendered a verdict of guilty against all the defendants.

The Court then pronounced judgment. Each defendant was sentenced to serve three years at Leavenworth, Kansas, penitentiary, and to pay a fine of $100.00.

The defendant Steffen alone appealed by writ of error.

SPECIFICATION OF ERROR.

I.

That exception was duly made and allowed to the refusal of the Court to direct a verdict of not guilty for the defendant.

II.

That there is no evidence in the record to support the judgment against the defendant.

ARGUMENT.

Counsel is familiar with the rule of this Circuit that the defendant's appearance upon the witness stand after the denial of a motion for a directed verdict at the close of the prosecution is deemed a waiver of the motion, particularly when the motion is not repeated at the conclusion of the testimony.

An examination of the record shows that the Court should have granted the motion at the close of the prosecution. Its denial was flagrant error.

There was no evidence adduced by the prosecution by which this defendant could have been convicted, and the matter should have been taken from the jury, without permitting negligent counsel to pry open the doors of the penitentiary and shove his client in.

In view of the condition of the record, we believe that as the point was made at the close of the prosecution, that it should be considered; that the case is within the rule set forth in Sykes vs. United States, 204 Federal, 909, "where the life, or, as in this case, the liberty, of the defendant is at stake, the courts of the United States, in the exercise of sound discretion, may notice such a grave error as his conviction to support it, although the question it presents was not properly raised in the trial court by request, objection, exception, or assignment or error. Wiborg vs. United States, 163 U. S. 632, 658; Clyatt vs. United States, 197 U. S. 207, 221; Crawford vs. United States, 212 U. S. 183; Weems vs. United States, 217 U. S. 349," and other cases cited.

An examination of the record and the indictment shows that no conspiracy was claimed by the government, and the only testimony upon which the jury could base its verdict against this defendant were extra-judicial statements made by the co-defendants, which were taken from the consideration of the jury by the court's ruling at the request of the defendant.

We respectfully submit that the evidence does not sustain the verdict against the defendant Steffen and to him the judgment of conviction should be reversed.

Dated Portland, Oregon, August 30, 1023.

CHAS. W. GARLAND,
Attorney for Plaintiff in Error.